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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 457

STATE OF INDIANA ON THE RELATION OF RICHARD ZILKY,
Petitioner,

vs.

LAKE SUPERIOR COURT, ROOM 1; JOSEPH V. STODOLA, JR., AS JUDGE OF LAKE SUPERIOR COURT, ROOM 1,
Respondents.

STATE OF INDIANA ON THE RELATION OF AMERICAN FLETCHER NATIONAL BANK AND TRUST COMPANY, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE OF THE WILLIAM BARTLETT ESTATE, JANE R. BARRY AND CHARLES R. KINNAIRD,
Petitioners,

vs.

LAKE SUPERIOR COURT, ROOM 5; JOSEPH V. STODOLA, JR., AS SPECIAL JUDGE OF LAKE SUPERIOR COURT, ROOM 5,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

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STATE OF INDIANA ON THE RELATION OF AMERICAN FLETCHER NATIONAL BANK AND TRUST COMPANY, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE OF THE WILLIAM BARTLETT ESTATE, JANE R. BARRY AND CHARLES R. KINNAIRD,
Petitioners,

vs.

LAKE SUPERIOR COURT, ROOM 5; JOSEPH V. STODOLA, JR., AS SPECIAL JUDGE OF LAKE SUPERIOR COURT, ROOM 5,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF INDIANA.

Petitioners, State of Indiana on the relation of Richard Zilky and State of Indiana on the relation of American Fletcher National Bank and Trust Company, a national banking association, as trustee of the William Bartlett Estate, Jane R. Barry and Charles R. Kinnaird, pray that writs of certiorari issue to review the judgments entered in the above cases on May 23, 1961.

OPINIONS BELOW.

These were original actions in the Supreme Court of Indiana. The opinions therein (R. 198-201; 490-498) are not yet officially reported, but are unofficially reported at 175 N. E. 2d 3 and 175 N. E. 2d 9. Copies of the said opinions are set out in Appendix A hereto.

JURISDICTION.

The judgments of the Supreme Court of Indiana were made and entered on May 23, 1961.[1] (R. 1, 201; 248, 498.) Petitioners' petitions for rehearing were denied on June 30, 1961. (R. 244; 544.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

In class representative actions pending in the respondent Lake Superior Court, Rooms 1 and 5, which the defendant City of Hammond, Indiana, moved to dismiss for abandonment and want of prosecution, Richard Zilky, an unnamed member of the plaintiff class in the action in Room 1, and American Fletcher National Bank and Trust Company, as trustee of the William Bartlett Estate, Jane R. Barry and Charles R. Kinnaird, the successors in interest to named plaintiffs in the class action in Room 5, sought to intervene and continue the actions for the benefit of the plaintiff classes. The respondent court denied the motions to intervene, dismissed the action in Room 5, and struck out a motion to set aside the dismissal of the action in Room 1. The petitioners thereupon applied to the Supreme Court of Indiana for writs of mandate to compel the respondent court to vacate and set aside the orders of

1. The judgments are contained in the opinions set out in Exhibit A hereto.

dismissal and to allow the petitioners to continue the prosecution of said actions for the benefit of the plaintiff classes. The Supreme Court of Indiana issued alternative writs of mandate to the respondent court which were subsequently dissolved and permanent writs denied on untenable grounds. The questions presented are:

1. Whether the plaintiff classes have a right, guaranteed by the Fourteenth Amendment to the Constitution of the United States, to be accorded the opportunity to have their causes of action determined on the merits which cannot be prejudiced by dismissals of such actions in violation of the applicable statute?

2. Whether petitioner Richard Zilky, as a member of the plaintiff class in the action in Room 1, has a right, guaranteed by the Fourteenth Amendment to the Constitution of the United States, to be named as a party plaintiff to continue the prosecution of the action and to protect the interests of the plaintiff class where the original named plaintiff has allowed the interests of the members of the plaintiff class to be jeopardized by an improper order of dismissal?

3. Whether petitioners American Fletcher National Bank and Trust Company, as trustee of the William Bartlett Estate, Jane R. Barry and Charles R. Kinnaird, as the successors in interest of original named plaintiffs in the class action in Room 5, have a right, guaranteed by the Fourteenth Amendment to the Constitution of the United States, to be substituted in the action and to continue the prosecution of the action for the benefit of the plaintiff class?

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED.

The pertinent portions of U. S. Const. amend. XIV, § 1; 12 U. S. C. § 34a (1958): Burns' Ind. Stats. Ann., §§ 2-220, 2-227, 2-901, 2-1072, 3-2201, and 4-1109; and Supreme Court of Indiana Rules 2-22, 2-35, 2-36, 2-37, 2-38 and 2-39, are set forth in Appendix B hereto.

STATEMENT OF THE CASES.

The two cases, which are the subject of this petition, were original actions in the Supreme Court of Indiana for writs of mandate directed to the respondent Lake Superior Court, Rooms 1 and 5, to compel it to perform certain duties enjoined by law upon it in respect of two class representative actions pending in the respondent court. These two class actions were selected by counsel for petitioners as subjects for the mandate actions out of approximately one hundred similar class actions pending in the respondent court with the expectation that a resolution by the Supreme Court of Indiana of the issues presented in the mandate actions would be controlling in all of the class actions. The class actions in question have had a long and involved history, and a brief summary of this history leading up to the filing of the present mandate actions is required for an understanding of the questions presented.

The two class actions directly involved on the present petition were filed in the respondent court on February 14, 1939, and October 23, 1944, respectively, by certain named plaintiffs, for and on behalf of themselves and all other persons, firms and corporations similarly situated holding and owning bonds and coupons issued pursuant to Improvement Resolutions Nos. 1548 and 1563, respectively, of the Board of Public Works of the City of Hammond, Lake County, Indiana, against the City of Hammond,

Indiana. On February 28, 1947, a consent judgment for the sum of $2,453.37 was entered in the case involving Improvement Resolution No. 1563 against the City of Hammond in favor of the class represented by the plaintiffs. On March 11, 1947, a consent judgment for the sum of $27,847.13 was entered in the case involving Improvement Resolution No. 1548 against the City of Hammond in favor of the class represented by the plaintiff. (R. 4; 251-2.)

Thereafter, on June 7, 1947, and June 14, 1947, respectively, one Jay E. Darlington, a taxpayer of the City of Hammond, Indiana commenced two actions in the Lake Superior Court, Rooms 1 and 5, to enjoin the City of Hammond from paying the two aforesaid judgments as well as the judgments rendered in 57 other class actions in Lake Superior Court, Room 1, two other class actions in Room 2 of said court, and 42 other class actions in Room 5 of said court, and to have the said judgments adjudged void. The judgments against the City of Hammond so challenged aggregated $958,000.00. The venue of the two Darlington actions was subsequently changed to the Porter Circuit Court of Porter County, Indiana. On September 7, 1948, the Porter Circuit Court filed special findings of fact and conclusions of law and rendered its decree thereon declaring that the challenged judgments entered by the Lake Superior Court were void and permanently enjoined the enforcement thereof. (R. 5; 252.)

During the trial of the injunction actions in the Porter Circuit Court, the plaintiff Darlington subpoenaed and introduced in evidence every record of the Lake Superior Court in the class actions including the jacket files, docket sheets and the order book sheets. An appeal was taken by some of the defendants in the injunction actions to the Appellate Court of Indiana, and the said original records of the Lake Superior Court in the class actions were incorporated into the bill of exceptions and filed as a part of

the record on appeal. (R. 5; 252-3.) See *State ex rel. Gilkison* v. *Clifford, Judge*, 120 Ind. App. 84, 89 N. E. 2d 630 (1950).

After a consideration of the merits of the appeal from the judgment of the Porter Circuit Court in the Darlington injunction actions, the Appellate Court of Indiana affirmed that portion of the decree which determined that the judgments rendered against the City of Hammond in the class actions are void, but reversed the decree of injunction as being too broad. The Appellate Court stated that the Porter Circuit Court should have returned the parties to the *status quo* by ordering the judgments in the class actions set aside and readjudicated on the basis of the merits of each case. The cause was remanded to the Porter Circuit Court with instructions to restate its conclusions of law to conform with the opinion of the Appellate Court, and that it enter a judgment setting aside all of the purported judgments so found to be void. (R. 5-6; 253.) See *Gilkison* v. *Darlington*, 123 Ind. App. 28, 106 N. E. 2d 473 (1952).

Upon remand of the cause, the Porter Circuit Court on June 23, 1954, restated its conclusions of law and entered a judgment in accordance with the mandate of the Appellate Court. (R. 6, 46; 253, 325.)

Thereafter, Darlington and his attorneys commenced ancillary proceedings in the cause in the Porter Circuit Court for the allowance of attorneys fees' and expenses for their services in setting aside the judgments in the class actions. The trial court awarded Darlington and his attorneys a judgment against the City of Hammond for $250,000.00 for their services as attorneys, and $15,000.00 for expenses incurred in the action. Upon appeal by the City of Hammond, the Supreme Court of Indiana held that there had not been such a disposition of the class actions

that Darlington and his attorneys were then entitled to a fee from the city for their services. Accordingly, the judgment of the Porter Circuit Court in the attorneys' fee case was reversed, the cause was ordered continued for the submission of further evidence pertaining to the final determination of the judgments in each of the class actions, and the trial court was directed to fix a reasonable attorney's fee in those cases which had been finally determined and as the remainder were finally determined. See *City of Hammond* v. *Darlington*, 162 N. E. 2d 619 (Ind. 1959), rehearing denied 173 N. E. 2d 662 (1961), superseding 154 N. E. 2d 402 (Ind. App. 1958).

Thereupon, Darlington's attorneys volunteered their services to the City of Hammond for the purpose of disposing of the class actions. On March 4 and 9, 1960, respectively, said attorneys filed motions in the respondent court to strike the two class actions here involved from the docket because of abandonment. (R. 6, 10-12; 253, 258-260.) Prior to the filing of such motions, there had been no proceedings in either case since the judgments therein had been set aside in 1954. Moreover, the records of the respondent court in both of said cases have remained in the custody of the Appellate Court of Indiana as part of the record on appeal in the Porter Circuit Court action, and the respondent court did not possess a single record pertaining to either of said actions. Therefore, in order to note the filing of the said motions to strike, the clerk of the respondent court began a new docket sheet in each of said causes. (R. 6, 13-16; 254, 261-271.)

The named class plaintiff in the action in Room 1 was originally represented by Mr. Donald C. Gardner. Gardner subsequently ceased to practice law. Nevertheless, the attorneys for the City of Hammond purported to serve the plaintiff class in that action by delivering a copy of its motion to strike to said Donald C. Gardner a few days

before the date on which said motion was set for hearing, but did not notify him of the date set for the hearing of said motion. (R. 6-7.) On March 14, 1960, the respondent Lake Superior Court, Room 1, entered an order purporting to grant said motion and to dismiss the cause for abandonment. (R. 7, 17-18.)

The original class plaintiff not having appeared of record or undertaken to protect the rights of the plaintiff class, petitioner Richard Zilky, a member of said class, on June 27, 1960, and within the same term of court, filed his petition to intervene in said cause as a named plaintiff to continue the prosecution thereof for the benefit of the plaintiff class. (R. 7, 19-20.) On the same date, Zilky also filed a motion to vacate and set aside the order of dismissal entered by the respondent court on March 14, 1960. (R. 8, 21-25.) On July 11, 1960, the City of Hammond filed a motion to strike the pleadings and papers of Zilky. (R. 8, 26-27.) On July 28, 1960, Zilky presented evidence that he is the owner of the bonds set out in his petition to intervene as a new named class party, thus establishing that he is a member of the plaintiff class. (R. 8.) Nevertheless, the respondent court on July 29, 1960, entered an order denying Zilky's petition to intervene and striking his motion to vacate the order of dismissal. (R. 8, 30-31.)

In the other class action here involved, the Honorable Harold L. Strickland, the duly elected judge of the respondent Lake Superior Court, Room 5, refused to rule on the motion to strike the cause for abandonment until the court's records were produced. (R. 254, 261.) Thereafter, on April 16, 1960, the City of Hammond filed a motion for change of venue from the judge, the motion was granted and the respondent Joseph V. Stodola, Jr. was appointed as special judge on April 18, 1960, and he qualified as

special judge and assumed jurisdiction of the cause on April 22, 1960. (R. 254, 262.)

On May 2, 1960, the American Fletcher National Bank and Trust Company, the successor by consolidation to Fletcher Trust Company, one of the original plaintiffs in the class action in Room 5, filed its petition to intervene and be substituted as a party in said cause. (R. 254, 272-275.) On May 16, 1960, Jane R. Barry and Charles R. Kinnaird, the present owners of the Barrett bonds of the City of Hammond formerly owned by Charles O. Roemler, deceased, who also was one of the original plaintiffs, filed their petition to intervene and be substituted as parties in the cause. (R. 254, 276-279.) On May 19, 1960, the City of Hammond filed objections to the petition of American Fletcher National Bank and Trust Company. (R. 254-255, 280-290.) Thereafter, on June 20, 1960, the respondent court entered an order denying the aforesaid petitions to intervene and be substituted as parties in the class action, but giving the petitioners ten days to file their supplemental complaints as contemplated by Burns' Ind. Stats. Ann. (1946 Repl.), § 2-227, and proceed thereon upon the issues joined therein according to law. (R. 255, 293-294.)

Pursuant to the aforesaid order, the said petitioners on June 23, 1960, filed their supplemental complaint alleging in substance that they are the present owners of the Barrett bonds of the City of Hammond formerly owned by Fletcher Trust Company, as trustee of the William Bartlett Estate, and Charles O. Roemler, deceased, and which bonds were the basis of the former owners' complaint in this cause, and adopting the complaint of the former owners as their own. (R. 255, 295-297.) On June 27, 1960, the City of Hammond filed objections and motion to strike such supplemental complaint. (R. 255, 298-304.) Thereafter, on July 25, 1960, the respondent court entered an

order holding that the said petitioners were interlopers and striking their supplemental complaint. (R. 256, 307-308), and on July 27, 1960, entered an order dismissing the class action for want of prosecution and striking it from the docket. (R. 256, 309-311.)

On October 19, 1960, the petitioner Richard Zilky, as relator, commenced an original action in the name of the State of Indiana in the Supreme Court of Indiana for a writ of mandate directed to the respondents Lake Superior Court, Room 1, and Joseph V. Stodola, Jr., as judge thereof, to compel the respondents to permit the said petitioner to intervene in the class action as a named party representing the plaintiff class and also to set aside the order of dismissal entered by the respondents on March 14, 1960. (R. 1, 9.) Also on October 19, 1960, the petitioners American Fletcher National Bank and Trust Company, as trustee of the William Bartlett Estate, Jane R. Barry and Charles R. Kinnaird, as relators, commenced another original action in the name of the State of Indiana in the Supreme Court of Indiana for a writ of mandate directed to the respondents Lake Superior Court, Room 5, and Joseph V. Stodola, Jr., as special judge thereof, to compel the respondents to set aside the order entered on July 25, 1960, striking the said petitioners' supplemental complaint, and to set aside the order entered on July 27, 1960, dismissing the class action for want of prosecution. (R. 248, 256-257.) Alternative writs of mandate were issued by the Supreme Court of Indiana as prayed in said petition. (R. 1, 41-43; 248, 320-322.)

The respondents filed their returns to the aforesaid alternative writs of mandate on November 18, 1960. (R. 1, 44-73; 248, 323-357.) Thereafter, the Supreme Court of Indiana on May 23, 1960, filed an opinion in each of said mandate actions dissolving the alternative writs of mandate theretofore issued and denying permanent writs. (R.

1, 198-201; 248, 490-498.) In each action it rested its decision on technicalities rather than on the merits. In the Zilky action it held (1) that the petition for writ of mandate was defective because it was not accompanied by a certified copy of the complaint in the original action which was alleged to have been dismissed without authority and in which Zilky sought to intervene, and (2) that Zilky has no standing in the case except for the purpose of prosecuting an appeal from the denial of his petition to intervene. (R. 198-201.) In the other mandate action it held (1) that the petition for writ of mandate was likewise defective because it was not accompanied by a certified copy of the complaint in the original class action, and (2) that the writ should be denied because of equitable considerations arising out of the delay in the prosecution of the class action by the petitioners and their predecessors in interest. (R. 490-498.)

On June 9, 1961, the petitioners filed petitions for rehearing in each of the said mandate actions. (R. 1, 202-204; 248, 499-501.) In the brief which the petitioners filed in support of said petitions for rehearing they specifically claimed the right under the Fourteenth Amendment to the Constitution of the United States to have the wrongful dismissals by the respondent court set aside and to have the merits of their claims, as representatives of the plaintiff classes of bondholders, against the City of Hammond adjudicated. (R. 205-227; 502-524.) On June 30, 1961, the said petitions for rehearing were denied by the Supreme Court of Indiana without opinion. (R. 1, 244; 248, 544.) Pertinent quotations of specific portions of the record that show that a federal question was timely and properly raised so as to give this Court jurisdiction to review the judgments below on writs of certiorari are set out in Appendix C hereto.

REASONS FOR GRANTING THE WRITS.

The decisions of the Supreme Court of Indiana, denying to the petitioners the right to appear and be heard on the merits of their causes of action, should be reviewed because they decide a federal question of substance in a way not in accord with the applicable decisions of this Court. Moreover, review by this Court of the issues presented by these two cases will be of far-reaching importance because approximately 100 other actions on behalf of classes of holders of Hammond Improvement Bonds have been dismissed by the respondent court under similar circumstances.

1. In *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (1878), the words "due process of law", when applied to judicial proceedings, were defined to "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." This definition was amplified in *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 708 (1884), where the Court said that, to be "due process", the proceeding "must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

In summarily dismissing the class actions in which the petitioners are interested for causes not contained in the Indiana dismissal statute,[2] the respondent court has denied to the petitioners due process of law as defined by the decisions of this Court. Unless dismissed for lack of jurisdiction or for a cause specified in the dismissal statute, a plaintiff, under the applicable Indiana decisions, has a

2. Burns' Ind. Stats. Ann. (1946 Repl.), § 2-901, the text of which is set out in Appendix B hereto.

right to be accorded the opportunity to have his cause of action determined on the merits, and such right cannot be prejudiced by the improper dismissal of his action.[3] In the event of an improper dismissal, a petition for writ of mandate is the plaintiff's proper remedy.[4] Accordingly, since the dismissals of the petitioners' actions by the respondent court were clearly not in accordance with the ordinary mode of procedure prescribed by the law of Indiana, due process requires that writs of mandate issue to compel the respondent court to reinstate such actions.

2. Petitioner Richard Zilky is an unnamed member of the class on whose behalf the action in Room 1 of the respondent court was brought. As such, Zilky was a party to the action from the beginning in the sense that he could not file a separate action based upon the subject matter of the class action.[5] Consequently, Zilky became entitled as a matter of right to be named as a party plaintiff to continue the prosecution of the action and to protect the interests of the plaintiff class after the original named plaintiff allowed an improper order of dismissal to be entered after the statute of limitations had run as to all the members of the class.[6]

With respect to the requirements of the Fourteenth Amendment as applied to class suits, it was said in *Hansberry* v. *Lee*, 311 U. S. 32, 42 (1940), that "this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it." Thus,

3. *State ex rel. Terminex Co. of Ind.* v. *Fulton Circuit Court*, 235 Ind. 218, 132 N. E. 2d 707 (1956); *State ex rel. Hurd* v. *Davis*, 227 Ind. 93, 84 N. E. 2d 181 (1949).

4. *Ibid.*

5. *City of Hobart* v. *Baum*, 237 Ind. 316, 145 N. E. 2d 573 (1957).

6. *Siegal* v. *Archer*, 212 Ind. 599, 10 N. E. 2d 626 (1937).

due process of law requires that members of a class not present as parties to the litigation, who will be bound by the judgment, be in fact adequately represented by parties who are present. But clearly it cannot be said that the absent members of the class are adequately represented by a party who abandons the action and allows an improper order of dismissal to be entered after the statute of limitation has run as to all members of the class. Nor can it be said that the procedure adopted by the respondent court, in improperly dismissing the class action and then denying Zilky's motion to intervene as a named party and striking his motion to set aside the improper order of dismissal, fairly insures the protection of the interests of the absent parties.

3. Fletcher Trust Company, as trustee of the William Bartlett Estate, was one of the original class plaintiffs in the action in Room 5 of the respondent court. The petitioner American Fletcher National Bank and Trust Company became the successor of Fletcher Trust Company by reason of a consolidation (R. 274) pursuant to the National Bank Act. 12 U. S. C. § 34a (1958). Under the provisions thereof, the corporate existence of Fletcher Trust Company continues in American Fletcher National Bank and Trust Company, and the latter is deemed to be the same corporation as the former and became trustee of the William Bartlett Estate by the operation of law. Nevertheless, the respondent court held that the petitioner American Fletcher National Bank and Trust Company was an interloper in the action. (R. 307-308.)

Charles O. Roemler was also an original class plaintiff in the action in Room 5 of the respondent court. Upon his death the petitioners Jane R. Barry and Charles R. Kinnaird succeeded to his interest in the action. Although the said petitioners, pursuant to leave granted by the respondent court (R. 293), had filed their supplemental com-

plaint (R. 295-297) and had become substituted as parties to the action in the place of their predecessor in interest,[7] nevertheless the respondent court thereafter held that they were interlopers in the action and struck out their supplemental complaint. (R. 307-308.)

In *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 273 (1927), it was recognized that a decision of a state court which "amounts to mere arbitrary or capricious exercise of power" deprives the unsuccessful party of property without due process of law. Likewise, in *Roberts* v. *New York*, 295 U. S. 264, 277 (1935), the Court, while recognizing that the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error, observed that there is a denial of due process of law where "the error [is] gross and obvious, coming close to the boundary of arbitrary action." In light of such language, the respondent court, in holding that the petitioners American Fletcher National Bank and Trust Company, Jane R. Barry and Charles R. Kinnaird, are interlopers in the action in Room 5, clearly denied them due process of law.

4. Although the federal questions sought to be reviewed were first raised in the petitions for rehearing filed by the petitioners in the mandate actions in the Supreme Court of Indiana, such federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgments on writs of certiorari. Since the petitioners' mandate actions invoked the original, and not the appellate, jurisdiction of the Supreme Court of Indiana, the rule—that a federal question first presented on petition for rehearing comes too late where the petition is denied without more—would seem to be inapplicable. In any event, under the authority of *Saunders* v. *Shaw*, 244 U. S. 317 (1917), *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313

7. Burns' Ind. Stats. Ann. (1946 Repl.), § 2-227, the text of which is set out in Appendix B hereto.

(1930), and *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930), the petitioners invoked the protection of the Fourteenth Amendment at the first opportunity, since it may not reasonably be held that they were bound to anticipate that the Supreme Court of Indiana would deny them their remedies by writs of mandate on the untenable grounds noted below.

5. In both cases below, the Supreme Court of Indiana held that the petitioners' petitions for writs of mandate were fatally defective because they were not accompanied by certified copies of the original complaints in the respondent court.[8] (R. 199-200; 494-496.) However, this ground for denying relief to the petitioners is clearly untenable, since the original complaints were not a part of the record on which the respondent court acted. The respondent court made all of the rulings complained of by the petitioners in the mandate actions without having any of its original records in the class actions before it. (R. 6; 253, 496-497.) Since the original complaints were not a part of the record on which the respondent court acted, it is axiomatic that the said original complaints had no pertinency to the subject matter of the petitions for writs of mandate.

The Supreme Court of Indiana purported to deny the petitioner Zilky's petition for writ of mandate on the additional ground that his remedy was by appeal and not by petition for writ of mandate. (R. 200-201.) None of the authority cited by the Supreme Court of Indiana in support of this holding is in point. Under the controlling

8. Rule 2-35 of the Supreme Court of Indiana provides that "[i]f the relief sought relates to a proceeding in an inferior court certified copies of all pleadings, orders and entries pertaining to the subject matter should be set out in the petition or made exhibits thereto." The full text of Rule 2-35 is set out in Appendix B hereto.

Indiana decision,[9] the petitioner Zilky was entitled to be named a party representing the plaintiff class as a matter of right, and the holding of the court below that the matter involved an exercise of discretion by the respondent court is clearly untenable. In this connection, it was said in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 456 (1958), that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

In the other case, the Supreme Court of Indiana, as an alternative ground for its decision, purported to deny the petition for writ of mandate of the petitioners American Fletcher National Bank and Trust Company, Jane R. Barry and Charles R. Kinnaird because of "the equitable considerations in this case which are adverse to the relators." (R. 497-498.) Specifically, the court held that the "circumstances present a strong presumption of laches with respect to the prosecution of this cause by the relators and their predecessors in interest." (R. 498.) This holding is wholly untenable, since laches constitute an affirmative defense which had not been specially pleaded by the defendant City of Hammond. Also, injury or prejudice to the defendant constitutes one of the essential elements of the defense of laches, and the record discloses no injury, or even claim of injury, to the City of Hammond from the delay in the prosecution of the class action.

It is apparent that the Supreme Court of Indiana sought to avoid the issues raised by the petitioners' petitions for writs of mandate by basing its decisions on grounds that are without any fair or substantial support, and are plainly untenable. Under the authority of *Ward* v. *Love County*, 253 U. S. 17 (1920), *Staub* v. *Baxley*, 355 U. S. 313 (1958),

9. *Siegal* v. *Archer*, 212 Ind. 599, 10 N. E. 2d 626 (1937).

and *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958), the non-federal grounds of decision put forward by the Supreme Court of Indiana in denying petitioners' petitions for writs of mandate do not bar review by this Court of the petitioners' claims that their rights under the federal constitution have been violated.

6. The denial of due process of law to litigants by a state court always presents a serious and important federal question that warrants review by this Court. Moreover, because of the fact that approximately 100 other actions on behalf of classes of holders of Hammond Improvements Bonds were dismissed by the respondent court under similar circumstances, the questions presented by these two cases are of great significance and make these cases peculiarly appropriate ones for the exercise of this Court's discretionary jurisdiction.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for writs of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINIONS BELOW.

In the Supreme Court of Indiana.

State of Indiana on the relation of Richard Zilky, *Relator*,
vs.
Lake Superior Court, Room 1, Joseph V. Stodola, Jr., as Judge of Lake Superior Court, Room 1, *Respondents*.
} No. 30024

ORIGINAL ACTION.

(Filed May 23, 1961. Alice C. Whitecotton, Clerk.)
Achor, *Judge*.

In this action relator asked for a writ of mandate commanding respondents to permit the relator to intervene in Cause No. 52261, in the Lake Superior Court, Room 1, as a named party representative of the class action and also that respondents be mandated to vacate and set aside an order dismissing that case, which order of dismissal was entered on March 14, 1960. This court issued an alternative writ.

This is a companion case to the case of *State ex rel. American Fletcher National Bank & Trust Company, etc., et al. v. Lake Superior Court, Room 5, Stodola, Spec. Judge,*

an original action for writ of mandate filed in this court October 19, 1960, Cause No. 30025. Judgment in this case, as was true in the companion case above cited, was set aside by the Porter Circuit Court on June 23, 1954, upon mandate of the Appellate Court of Indiana because of fraud in the procurement of said judgment. See: *Gilkison, et al. v. Darlington* (1952), 123 Ind. App. 28, 106 N. E. 2d 473.

The dismissal of Cause No. 52261 in the Lake Superior Court, Room 1, which relator here challenges by his petition for writ of mandate, was the result of a motion filed by the City of Hammond on March 4, 1960, asking that said cause be dismissed and stricken from the docket because of the abandonment of said cause by the parties plaintiff thereto.

Thereafter, on June 26, 1960, and within the same term of court, the relator, Richard Zilky, allegedly a member of the class originally represented by Ruth L. Kimes, administratrix in said Cause No. 52261, filed his petition to intervene in said cause as a party plaintiff. On the same date relator also filed a motion to vacate and set aside the order of dismissal entered by the respondent court on March 14, 1960.

On July 11, 1960, the defendant, City of Hammond, filed a motion in said cause to strike the pleadings and papers of the said Richard Zilky. The cause was submitted on July 28, 1960, and the respondent court thereafter on the following day entered an order denying relator's petition to intervene, striking relator's motion to vacate the order of dismissal.

In this court, as in the companion case of *State, ex rel. v. Lake Superior Court, Room 5, Stodola, Spec. J., supra*, we are, at the outset, confronted by the fact that the petition is not accompanied by a certified copy of the complaint in the original action which is alleged to have been

dismissed without authority and in which action the relator seeks to intervene. For the reason stated in the companion case of *State, ex rel.* v. *Lake Superior Court, Room 5, Stodola, Spec. J., supra*, this failure on the part of relator here to provide the court with "certified copies of all pleadings, orders and entries pertaining to the subject matter" in the action, as provided by Rule 2-35, is jurisdictional, and for this reason alone the petition filed herein is fatally defective.

However, if we were to consider the relator's petition on its merits the petition must, nevertheless, be denied. When a party other than the named party in a class action, alleges that he is a member of the class and asks to intervene on the ground that the named party-plaintiff in the action has failed to prosecute the action with diligence, this allegation does not, in itself, impose a mandatory duty upon the court to grant the petition. Rather the petition to intervene is addressed to the discretion of the court and is contingent upon a prima facie showing that the original party-plaintiff had a right to maintain the action, that the party who seeks to intervene is a proper member of the class represented by the original party-plaintiff and that he has exercised diligence with respect to such intervention. *City of Hobart* v. *Baum, et al.* (1957), 237 Ind. 316, 145 N. E. 2d 573; *State ex rel.* v. *Simmons* (1944), 223 Ind. 27, 57 N. E. 2d 587; *Forsyth* v. *American Maize Products Co.* (1915), 59 Ind. App. 634, 108 N. E. 622; 22 I. L. E. *Parties*, § 21 (1959). Such a determination involves consideration of both law and fact. Under such circumstances the decision of the trial court is reviewable by this court only by appeal. It is not reviewable by petition to mandate. *State ex rel. Tomlinson* v. *Jeffrey* (1952), 231 Ind. 101, 107 N. E. 2d 1. Flanagan, Wiltrout and Hamilton, Indiana Trial and Appellate Practice §§ 2986 and 2991 (1952).

Relator has cited and relies upon the case of *Siegel* v. *Archer* (1937), 212 Ind. 599, 10 N. E. 2d 626, as supporting a contrary position. Although in that case the court stated the general proposition of law on page 603 that "a member of the class is entitled to be named as a party plaintiff upon a showing that the original plaintiff is allowing the interests of the members of the class to be jeopardized • • • [And that] a voluntary dismissal by the named plaintiff would adversely affect the interests of the members of the class." Nevertheless, it must be noted that the issue in that case was presented to this court by *appeal,* and not by petition to mandate.

In this case the trial court considered the question of relator's right to intervene, and determined the issue adversely to this relator. Therefore, as the case is presented to us, relator has no standing in the case, except for the purpose of prosecuting an appeal from the denial of his petition to intervene.

The alternative writ of mandate heretofore issued is therefore dissolved, and the petition for a permanent writ of mandate is denied.

LANDIS, *C. J.* and ARTERBURN, *J.* concur.

BOBBITT, and JACKSON, *JJ.* concur in the result.

IN THE SUPREME COURT OF INDIANA.

State of Indiana on the Relation of American Fletcher National Bank and Trust Company, a national banking association, as Trustee of the William Bartlett Estate, Jane R. Barry and Charles R. Kinnaird,

Relators,

vs.

Lake Superior Court, Room 5; Joseph V. Stodola, Jr., as Special Judge of Lake Superior Court, Room 5,

Respondents.

No. 30025

ORIGINAL ACTION.

(Filed May 23, 1961. Alice C. Whitecotton, Clerk.)

ACHOR, *Judge.*

Relators herein seek a writ of mandate, commanding the respondents to set aside the order entered on July 25, 1960, striking the relators' supplemental complaint in Cause No. 57536, in the respondent court and to set aside the order entered on July 27, 1960, dismissing the cause on the ground of abandonment by the predecessors in interest to the relators herein.

The matter here in controversy has followed the long and devious course of litigation in the courts of this state. Therefore, an understanding of the issues here presented requires more than the usual statement of facts.

As stated in relator's petition, on October 23, 1944, Charles O. Roemmler, Fletcher Trust Company, as Trustee of the William Bartlett Estate, Carl A. Huebner and Clifford L. Etling, for and on behalf of themselves and all other persons, firms and corporations similarly situated, allegedly holding and owning improvement bonds and coupons issued by the City of Hammond, Indiana, filed an action against the City of Hammond in the Lake Superior Court, Room 5, which was docketed as Cause No. 57536. Thereafter, on February 28, 1947, an agreed judgment for the sum of $2,454.57 was entered in said action against the City of Hammond in favor of the class allegedly represented by the plaintiffs. Similar judgments were also entered in other cases in the aggregate sum of approximately $950,000.00.

Thereafter, on June 14, 1947, Jay E. Darlington, an attorney and taxpayer of the City of Hammond, commenced an action in the Lake Superior Court, Room 5, which was docketed as Cause No. 60850, to enjoin the City of Hammond from paying the judgment rendered in said Cause No. 57536 and other similar judgments on the ground of fraud in their procurement. The venue of the Darlington action was changed to the Porter Circuit Court. On September 7, 1948, the Porter Circuit Court filed special findings of fact and conclusions of law and rendered its decree thereon, declaring that the judgments entered by the Lake Superior Court, Room 5, including said Cause No. 57536, with which we are here concerned, were void because of fraud in their procurement and permanently enjoined the enforcement thereof.

The judgment of the Porter Circuit Court was appealed to the Appellate Court of Indiana which affirmed that portion of the decree which determined that the judgments were void, but reversed the decree of injunction as being too broad. The Appellate Court stated that under the

circumstances of the case, the Porter Circuit Court, pursuant to its findings, should have returned the parties to the status quo by ordering all the judgments set aside which were determined to be void in order that they might be readjudicated on the basis of the merits of each particular case. *Gilkinson, et al.* v. *Darlington* (1952), 123 Ind. App. 28, 46, 106 N. E. 2d 473 [Transfer denied November 13, 1952]. See also: *City of Hammond* v. *Darlington* (1958), Ind. App. , 154 N. E. 2d 402; *City of Hammond* v. *Darlington* (1959), Ind. , 162 N. E. 2d 619.

Upon remand of the cause by the Appellate Court (123 Ind. App. 28, *supra*), the Porter Circuit Court, on June 23, 1954, restated its conclusions of law and entered a judgment in accordance with the mandate of the Appellate Court. However, thereafter neither the plaintiffs in said Cause No. 57536, nor their successors (the relators herein) in interest or the respondent, Lake Superior Court, Room 5, took action with respect to this particular case, except as hereinafter set forth.

On March 9, 1960, the City of Hammond filed a motion in the Lake Superior Court, Room 5, to strike and dismiss said Cause No. 57536 because of abandonment by the parties-plaintiffs. The motion cites the fact that although said judgment was declared void and ordered set aside by the Appellate Court because of fraud in its procurement, no action or proceedings were had in said cause during the intervening period of six years by the purported plaintiffs or their attorneys of record or by anyone else. The motion then asserted that because of this patent abandonment of the action by the parties-plaintiffs and all other members of the alleged class, the City of Hammond was entitled to a decree dismissing said cause of action and striking it from the docket and thereby formally and finally terminating the controversy which because of the

nature of the action was of great and obvious public interest. Notice of the filing of said motion was served upon Carl A. Huebner, as representative of the class and as attorney of record, pursuant to Rule 1-16 of this court. The cause was set for hearing on March 25, 1960, on which date attorney Paul B. Huebner, son of Carl A. Huebner, appeared of record in the case but no action of record was taken with respect to the requested dismissal of the cause.

Thereafter, pursuant to a change of venue from the judge, the respondent, Joseph V. Stodola, Jr., was appointed special judge on April 18, 1960.

Thereafter these relators filed petitions to intervene and be substituted as parties to the cause. The cause was submitted on relators' petition to intervene and on answers and objections of the City of Hammond, and, on June 20, 1960, the respondent court entered an order denying the petitions of relators to intervene and be substituted as representative plaintiff parties in said class action. However, on that date, the court gave the relators ten days to file supplemental complaints as contemplated by Burns Ann. St. § 2-227 (1946 Repl.), with respect to any bonds in which said parties individually held as successors in interest.

Thereafter the relators, on June 23, 1960, filed their supplemental complaint in which they alleged, generally, that they were the present owners of the Barrett Bonds of the City of Hammond, formerly owned by the Fletcher Trust Company, as Trustee of the William Bartlett estate, and by Charles O. Roemmler, deceased, which bonds were the basis of the former owners' complaint in this cause and "adopting the complaint of the former owners (in the nature of a class action) as their own."

On June 27, 1960, the City of Hammond filed its objec-

tions and a motion to strike the supplemental complaint. On July 7, 1960, the cause was submitted on the motion to strike the supplemental complaint and the City of Hammond's objections thereto. The court then entered an order holding that the relators were interlopers and struck their supplemental complaint from the record.

Thereafter, on July 27, 1960, the respondent court entered a finding, among other things, that a motion to dismiss and strike the cause of action, because of abandonment, had been filed in Cause No. 57536 on March 9, 1960, that notice had been served upon representatives of the class action, that no response to the motion had been filed asserting any meritorious ground or reason why the cause should not be dismissed because of the abandonment thereof by the plaintiffs and members of the alleged class. The court then, on the basis of the pleadings before it, entered an order dismissing the cause for want of prosecution and the same was accordingly stricken from the docket.

At the outset, we are confronted with two significant deficiencies in relators' petition. First, the petition is not accompanied by a certified copy of the original complaint in the Lake Superior Court upon which the primary action is based, as required by Rule 2-35 of this court. Instead, relators, in their supplemental complaint, merely stated that they "adopt the complaint (of their predecessors in interest) as their own."

We have held that compliance with Rule 2-35 is jurisdictional. In *State ex rel. Woods, Treas.* v. *Knox C. C., Seal, J.* (1954), 233 Ind. 552, 553-554, 121 N. E. 2d 880, in dissolving an alternative writ of mandate and denying a permanent writ, this court held as follows:

> "Rule 2-35 of this court requires the relator in a proceeding of this kind to set out in his petition, or to exhibit therewith, certified copies of all pleadings, orders and entries pertaining to the subject-matter. This the relators have failed to do.

"The rules of this court are binding alike upon all litigants and upon this court. If equal justice is to be administered, the rule must be impartially enforced. We have consistently and repeatedly refused to issue writs of mandate or prohibition where there has been a failure to comply with this rule. *State ex rel. Minton* v. *Parke Cir. Ct.* (1948), 226 Ind. 55, 77 N. E. 2d 749; *State ex rel. Ketchum* v. *Marshall* (1952), 231 Ind. 70, 106 N. E. 2d 796; *State ex rel. Wall* v. *Cass Circuit Court* (1954), 233 Ind. 192, 117 N. E. 2d 126; *State ex rel. Dopkowski* v. *Murray* (1952), 230 Ind. 634, 106 N. E. 2d 100; *Spires* v. *Bottorff* (1952), 230 Ind. 230, 102 N. E. 2d 819; *State ex rel. Ballew* v. *Smith* (1952), 230 Ind. 422, 104 N. E. 2d 575; *Warmouth* v. *Owen* (1951), 229 Ind. 279, 97 N. E. 2d 866. There are many others.

"In this matter the respondents have furnished certified copies of six paragraphs of counter-claim and amended paragraphs one to six inclusive of counter-claim, all of which are germane to the subject-matter, and none of which were furnished by the relators. It is suggested that by so doing the respondents have waived any defect that might have been occasioned by the relators' failure to comply with the rule.

"What view we might take of that situation under circumstances other than those presented here we need not decide. In this case the respondents were obliged to complete the record for the purpose of bringing to the attention of this court omitted portions of the record upon which they relied.

"The alternative writ is dissolved and a permanent writ is denied."

See also: *State, ex rel. Mejer* v. *Davie* (1955), 234 Ind. 651, 129 N. E. 2d 799; *State ex rel. Wilkerson* v. *East, Judge* (1954), 233 Ind. 657, 122 N. E. 2d 733; *State, ex rel. Crawford* v. *Owen* (1948), 225 Ind. 601, 77 N. E. 2d 123.

There is particular reason for requiring a certified copy of the complaint in the original action be filed in compliance with Rule 2-35. Relators' rights, if any, to ask for relief in mandamus is contingent upon a prima facie showing that their predecessors in interest had a meritorious cause of action. As heretofore stated, the judgment previously entered in this cause, together with many similar judgments, was ordered set aside after appeal because of fraud in its procurement. The fraud consisted, generally, in the fact that the judgments were taken by consent of the plaintiffs and defendant without any proof, although the named plaintiffs in the class actions were not bona fide holders of the bonds which they were alleged to own, or the bonds had been outlawed by the statute of limitations. In this proceedings it is asserted by respondents, *first*, that the bonds allegedly owned by the predecessors in interest to these relators were not introduced in evidence in the original action in the trial court, and, *secondly*, that said bonds and coupons were, in fact, outlawed by the statute of limitations prior to the filing of the original action on October 23, 1944. Thus, in the absence of the original complaint in this case, relator's petition does not present a prima facie showing that relators are entitled to any relief in the primary cause of action and therefore that they are entitled to the immediate and extraordinary relief herein sought.[1]

However, a decision in this case need not be predicated solely upon the above cited defect in the record as it is

1. Relators have attempted to excuse their failure to file a certified copy of the original complaint in this case on the ground that such complaint is presently on file in the Porter Circuit Court in the proceedings related to this action. This excuse is not sufficient to justify relators' failure to comply with Rule 2-35 of this court. We judicially know that such records or certified copies thereof are available for the purpose of this proceedings, under the circumstances above stated. Therefore relators' explanation is, in effect, an admission that the complaint is available to them, or could be made available to them on proper request.

presented to us. Relators' action is subject to a second significant weakness. Proceedings in mandate to this court is an extraordinary remedy, therefore although the action itself is legal in character, the relief sought may be denied and the parties required to present the question raised by ordinary appeal because of equitable principles. This court recognized this rule in the case of *State ex rel. Burton* v. *City of Princeton, et al.* (1956), 235 Ind. 467, 470, 134 N. E. 2d 692, wherein this court stated:

> "Although an action in mandamus is an extraordinary legal remedy, equitable principles may prevent such relief. 'The writ of mandamus is an extraordinary writ, and, while not discretionary, it will only be issued by a court in the exercise of a sound legal discretion. "It is a remedial process and may be issued to remedy a wrong, not to promote one, to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public and private mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud * * *." *People ex rel.* v. *Board, etc.* (1893), 137 N. Y. 201, 204, 33 N. E. 145.' *Western Union Tel. Co.* v. *State, ex rel. Hammond Elevator Co.* (1905), 165 Ind. 492, 512, 76 N. E. 100, 3 L. R. A. (N. S.) 153."

See also: *State ex rel. Guide Management Corp.* v. *Alexander* (1945), 223 Ind. 221, 231-32, 59 N. E. 2d 169; *Funk* v. *State, ex rel.* (1906), 166 Ind. 455, 457, 77 N. E. 854.

Also, in the case of *State* v. *Grant Circuit Court* (1959), ... Ind. ....., 157 N. E. 2d 188, 191, where the petitioners sought a writ of mandate and prohibition, the court in denying the petition stated: "* * * Although no specific statutory provision prescribes the time for judicial review in equity hereunder, it is apparent such action must be brought expeditiously and without unnecessary delay * * *."

With regard to the equitable consideration in this case,

we are confronted with the fact that the original judgment in this cause of action was set aside for fraud in its procurement; that the action was against a municipality and therefore of public interest; that the predecessors in interest to these relators, and these relators themselves, with no contradiction of full knowledge of the above stated circumstances, took no action with respect to this cause of action for a period of six years after the judgment formerly taken therein had been set aside for fraud; that notwithstanding the allegations contained in respondents' motion to dismiss, relators filed no response thereto which, in anywise, attempted to excuse or justify their inaction in and apparent abandonment of the matter over such six year period. These circumstances present a strong presumption of laches with respect to the prosecution of this cause by the relators and their predecessors in interest.

It is our conclusion that because relators have not provided us with the necessary copies of the pleadings pertaining to the cause to present a prima facie showing of merit and of the equitable considerations in this case which are adverse to the relators, the extraordinary relief of mandamus should be denied.

For the reasons above stated, the petition for writ of mandate is denied.

LANDIS, *C. J.* and ARTERBURN, *J.* concur.

JACKSON, *J.* concurs in the result.

BOBBITT, *J.* dissents.

APPENDIX B.

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED.

The pertinent portion of U. S. Const. amend. XIV, § 1, provides:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

American Fletcher National Bank and Trust Company became the successor by consolidation of Fletcher Trust Company as of the close of business on December 31, 1954. The pertinent portion of 12 U. S. C. § 34a (1958), which was then in force, reads as follows:

> "Any bank incorporated under the laws of any State * * * may be consolidated with a national banking association located in the same State, county, city, town, or village under the charter of such national banking association * * *. * * *Upon such a consolidation, * * * the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in

action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation: * * *."

Burns' Ind. Stats. Ann., § 2-220 (1961 Supp.), reads as follows:

"Of the parties in the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the complaint, and when the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole; Provided, in the event one (1) or more parties sues or defends for the benefit of many who have a common or general interest, such cause of action shall be neither compromised, settled nor dismissed except for good cause shown and duly considered and determined by the court."

Burns' Ind. Stats. Ann., § 2-227 (1946 Repl.), reads as follows:

"No action shall abate by the death or disability of a party, or by the transfer of any interest therein,

if the cause of action survive or continue. In case of the death or disability of a party, the court on motion or supplemental complaint, at any time within one (1) year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action."

Burns' Ind. Stats. Ann., § 2-901 (1946 Repl.), reads as follows:

"An action may be dismissed without prejudice—

"First. By the plaintiff, before the jury retires; or, when the trial is by the court, at any time before the finding of the court is announced.

"Second. By the court where the plaintiff fails to appear on trial.

"Third. By the court, on the refusal to make the necessary parties, after having been ordered by the court.

"Fourth. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

"Fifth. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

"In all other cases upon the trial, the decision must be upon the merits."

(§ 2-901 was amended by Ind. Acts. 1961, ch. 224, § 1, but such amendment is not pertinent to the present cases.)

Burns' Ind. Stats. Ann., § 2-1072 (1946 Repl.), reads as follows:

"The court may, on motion, allow supplemental pleadings, showing facts which occurred after the former pleadings were filed."

The pertinent portion of Burns' Ind. Stats. Ann., § 3-2201 (1961 Supp.), reads as follows:

> "* * * Writs of mandate and prohibition may issue out of the Supreme and Appellate Courts of this state in aid of the appellate powers and functions of said courts respectively. Such writs of mandate may issue out of the Supreme Court to the circuit, superior, criminal, probate, juvenile, conservancy district or municipal courts of this state, respectively, compelling the performance of any duty enjoined by law upon such circuit, superior, criminal, probate, juvenile, conservancy district or municipal courts, respectively, including the granting of changes of venue from the county in cases where such change of venue is allowed by law, and timely, proper and sufficient motion and affidavit have been filed therefor, and such change of venue has been refused; and also writs of prohibition may issue out of the Supreme Court to such circuit, superior, criminal, probate, juvenile, conservancy district or municipal courts, respectively, to restrain and confine such circuit, superior, criminal, probate, juvenile, conservancy district or municipal courts, respectively, to their respective lawful jurisdiction."

The pertinent portion of Burns' Ind. Stats. Ann., § 4-1109 (1946 Repl.), reads as follows:

> "* * * [T]he terms of holding of court of all of the judges of said Lake Superior Court shall be at the times and for the periods as follows, to wit: room number one and room number five shall be located in Hammond * * * and the terms of court shall begin on the first Mondays of January and July of each year, which terms shall contine for six months each, during which terms said court shall at all times be open for trials and proceedings."

Rules 2-22, 2-35, 2-36, 2-37, 2-38 and 2-39 of the Supreme Court of Indiana read as follows:

> "Rule 2-22. Rehearings. Application for a rehearing of any cause shall be made by petition, sep-

arate from the briefs, signed by counsel, and filed with the clerk within 20 days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs, but such briefs will not be received after the time allowed for filing the petition. Parties opposing the rehearing may file briefs within 10 days after the filing of the petition. Adopted April 17, 1940. Effective September 2, 1940. Amended June 17, 1943. Effective September 6, 1943.

"Rule 2-35. Original Actions Including Injunction and Writs of Mandate and Prohibition. Petitions for writs of mandamus and prohibition out of the Supreme Court and Appellate Court shall be verified and filed in quintuplicate. Except in cases involving a change of venue, no petition for a writ of prohibition will be entertained until the relator has first attacked the want or excess of jurisdiction of the trial court by a written motion, brought to the attention of the judge if filed in vacation, which has been denied or not promptly acted upon. Except in cases involving a change of venue, no petition for an alternative writ of mandamus will be entertained unless it be shown that the duty to act has been presented or brought to the attention of the trial court, or the judge thereof if in vacation. If the relief sought relates to a proceeding in an inferior court certified copies of all pleadings, orders and entries pertaining to the subject matter should be set out in the petition or made exhibits thereto. Petitions shall be accompanied by at least six copies of the appropriate form of the temporary or alternative writ to which the petitioner deems himself to be entitled, which writ shall command the respondent to show cause on or before a day to be fixed by the court why the writ should not be made permanent, or absolute. Adopted June 17, 1943. Effective September 6, 1943. Amended October 18, 1955. Effective January 2, 1956. Amended February 11, 1957. Effective March 1, 1957.

"Rule 2-36. Returns and Answers to Original Actions. Within the time allowed, the respondent may

file in quintuplicate a verified return showing any reason in law or in fact why the writ should not be obeyed. No other pleading on behalf of a respondent will be entertained. The provisions of Rule 2-35 as to certified copies shall apply to returns. Adopted June 17, 1943. Effective September 6, 1943. Amended October 18, 1955. Effective January 2, 1956. Amended February 11, 1957. Effective March 1, 1957.

"Rule 2-37. Briefs, Mandate, Prohibition and Other Original Actions. In support of their pleadings the parties should file six copies of all briefs, which need not conform to the requirements of Rule 2-19. Adopted June 17, 1943. Effective September 6, 1943. Amended October 18, 1955. Effective January 2, 1956.

"Rule 2-38. Oral Arguments—Mandate and Prohibition. Oral arguments will be heard only when ordered by the court. Adopted June 17, 1943. Effective September 6, 1943.

"Rule 2-39. Parties Bound—Mandate and Prohibition. When a temporary writ has been issued and served the parties will be charged with notice of the subsequent proceedings. Adopted June 17, 1943. Effective September 6, 1943.

APPENDIX C.

PORTIONS OF RECORD SHOWING THAT THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED.

The concluding portion of the brief filed by the petitioners on June 9, 1961, in the Supreme Court of Indiana, in support of their petitions for rehearing reads as follows:

> "III. The Relators' Rights Are Also Guaranteed By the Constitution of the United States.
>
> "Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides in part:
>
> > " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law;* nor deny to any person within its jurisdiction the equal protection of the law.' (Emphasis supplied.)
>
> "The rights guaranteed to the relators by Article 1, § 12, of the Constitution of Indiana are also guaranteed to the relators by the Fourteenth Amendment to the Federal Constitution. Therefore, in considering the arguments made by the relators in this brief based on Article 1, § 12, of the Constitution of Indiana, this court should take into consideration that the rights claimed by the relators herein are also protected by the Constitution of the United States." (R. 227; 524.)

By reason of the foregoing, the arguments made in the petitioners' said brief based on Article 1, § 12, of the Constitution of Indiana were also intended to be supported by

the Fourteenth Amendment to the Constitution of the United States.

In the introductory portion of the said brief, the petitioners asserted a constitutional right to have the wrongful dismissals by the respondent court set aside, and to have the merits of their claims adjudicated. The passage in question reads as follows:

> "Notwithstanding the mandate of the Appellate Court, the relators and the other bondholders interested in the class actions have been denied the right to have the merits of their cases readjudicated. Acting at the instance of lawyers who are attempting to collect a fee of $250,000.00 from the City of Hammond for disposing of such cases regardless of their merits, the respondent court has arbitrarily seized upon technicalities and dismissed them all. In so doing it has clearly violated Article 1, Section 12, of the Constitution of Indiana, and has failed to perform duties enjoined by law upon it.
>
> "The relators and the other bondholders have a constitutional right to have the wrongful dismissals by the respondent court set aside, and to have the merits of their claims against the City of Hammond readjudicated. After their rights have been so flagrantly violated, it is scandalous to place further obstacles in the path of their quest for justice. Accordingly, in view of the great public interest involved, the relators respectfully and urgently request this court to grant a rehearing in these mandate actions and thereby enable the relators and the other bondholders to obtain a speedy readjudication of the merits of their claims." (R. 207; 564.)

The constitutional provisions in question were again relied on in connection with the petitioners' argument that mandamus is a proper remedy where a trial court dismisses a case without statutory or inherent authority. The passage referring to the constitution reads as follows:

> "It is quite clear that the respondent court dismissed

the primary causes of actions for causes not contained in the dismissal statute (Burns' 1946 Replacement § 2-901). Moreover, the said dismissals cannot be supported under the respondent court's inherent power to dismiss for lack of jurisdiction. Since § 2-901 provides that '[i]n all other cases, upon the trial, the decision must be upon the merits,' the said dismissals were without authority and were improper; and the respondent court, in denying the relators and the other members of the plaintiff classes the opportunity to have their cases heard on the merits, violated Article 1, § 12, of the Constitution of Indiana. * * * " (R. 215; 512.)

Petitioners American Fletcher National Bank and Trust Company, Jane R. Barry and Charles R. Kinnaird specifically contended that the arbitrary holding of the respondent court that they were interlopers violated the constitutional provisions in question. The passages referring to the constitution read as follows:

"B. *In arbitrarily holding that the relators were interlopers the respondent court violated the Constitution of Indiana.*

"Specification 4 of the relators' petition for rehearing in No. 30025 points out that this court erred in failing to give a statement in writing and in failing to give a decision thereon of the question whether the respondent court failed to perform a duty enjoined upon it by Article 1, § 12, of the Constitution of Indiana when it arbitrarily held that the relators were interlopers and struck out their supplemental complaint. Such question is fully briefed in relators' brief filed on October 19, 1969, and in relators' reply brief filed, pursuant to leave of court, on December 7, 1960. Further detailed discussion would necessarily be redundant. A concise statement of the considerations involved will suffice here.

"The relator American Fletcher National Bank and Trust Company became the successor of Fletcher Trust Company, one of the original class parties in the pri-

mary cause of action, by reason of a consolidation pursuant to Sec. 34a of Title 12 of the United States Code. Under the provisions thereof the corporate existence of Fletcher Trust Company continues in American Fletcher National Bank and Trust Company, and the latter is deemed to be the same corporation as the former and became trustee of the William Bartlett Estate by operation of law. Since American Fletcher National Bank and Trust Company is the same legal person as Fletcher Trust Company, the respondent court clearly violated Article 1, § 12, of the Constitution in holding that American Fletcher National Bank and Trust Company was an interloper in the action. (R. 225; 522.)

* * * * *

"It is submitted that, in holding that the relators are interlopers in the action, the respondent court denied them a remedy by due course of law, thus clearly violating Article 1, § 12, of the Constitution of Indiana. * * *" (R. 226; 523.)

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 457

STATE OF INDIANA, on the relation of RICHARD ZILKY,
Petitioner.

vs.

LAKE SUPERIOR COURT, ROOM 1; JOSEPH V. STODOLA, JR., as Judge of Lake Superior Court, Room 1,
Respondents.

STATE OF INDIANA, on the relation of FLETCHER NATIONAL BANK & TRUST COMPANY, a National Banking Association, as Trustee of the WILLIAM BARTLETT ESTATE, JANE R. BARRY and CHARLES R. KINNAIRD,
Petitioners.

vs.

LAKE SUPERIOR COURT, ROOM 5; JOSEPH V. STODOLA, JR., as Special Judge of Lake Superior Court, Room 5,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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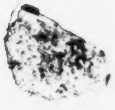

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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF INDIANA

I.

QUESTIONS PRESENTED FOR REVIEW.

There are three questions presented for review, as respondents understand the cases which are the subject matter of the instant petition. They are as follows:

(1) Whether or not writs of certiorari to the Supreme Court of Indiana should issue by the Supreme Court of the United States, in two original mandate actions in the Supreme Court of Indiana, wherein strangers to the record in the *nisi prisis* respondent Court (Lake Superior Court, Hammond, Indiana) below unsuccessfully sought the issuance of the extraordinary writ of mandate, in the Supreme Court of Indiana, to the respondent Lake Superior Court, Rooms 1 & 5, and the respondent judge to permit petitioners to intervene in purported class actions in the Lake Superior Court, Rooms 1 & 5. In both cases, hearings were conducted, evidence was introduced, and the petitions were denied. In one of the cases (Cause 52261, Lake Superior Court, Room 1) wherein petitioner Zilky sought to intervene, a final judgment had been rendered by respondent court, in favor of the City of Hammond, more than three months prior to the time petitioner Zilky filed his petition to intervene.

(2) Whether or not writs of certiorari should issue from this court to the Supreme Court of Indiana, in two original actions in mandate, wherein petitioners, strangers to the record in the respondent court below, sought writs of mandate to compel the respondent court to vacate and set aside final judgments in favor of the City.

(3) Whether or not this court has jurisdiction to entertain a petition for writs of certiorari to the Supreme Court of Indiana, wherein this court's jurisdiction is sought to be invoked under 28 U.S.C. §1257(3) but where no federal question is presented as set forth in 28 U.S.C. §1257(3), and petitioners seek to invoke the jurisdiction of this court under said section.

II.

STATEMENT OF THE CASES.

The two cases, which are the subject matter of the petition, in opposition to which this brief is filed, were original actions in the Supreme Court of Indiana seeking the issuance of the extraordinary writ of mandate. In "Original Action No. 30024" in the Supreme Court of Indiana, the Lake Superior Court, Room 1 (Hammond, Lake County, Indiana) is a respondent. The subject matter of said original action is Lake Superior Court, Room 1, Cause No. 52261. Hon. Joseph V. Stodola, Jr., is and was the duly elected, qualified and acting judge of the respondent Lake Superior Court, Room 1, and is also a respondent in said cause.

In "Original Action No. 30025" in the Supreme Court of Indiana, the Lake Superior Court, Room 5 (Hammond, Lake County, Indiana) is a respondent. Hon. Joseph V. Stodola, Jr. was selected as special Judge in Lake Superior Court, Room 5, Cause No. 57536, which was the subject matter of said original action, and is also a respondent in said action.

The purported class actions were filed in the respondent courts on February 14, 1939 (Cause No. 52261, Lake Superior Court, Room 1) and October 23, 1944 (Cause No. 57536, Lake Superior Court, Room 5). Both actions sought money damages, in favor of the purported class, against the City of Hammond, for alleged "misapplication and diversion of funds", on behalf of purported owners of City of Hammond Special Improvement Bonds. The City of Hammond, Indiana, was not the obligor on any of said bonds.

Thereafter, on March 11, 1947, and February 28, 1947, in the Lake Superior Court, Room Nos. 1 & 5, respectively, fraudulent judgments were entered against the City of Hammond for so-called misapplication and diversion of funds pursuant to a conspiracy entered into between the attorneys for the alleged plaintiffs and certain City officers.

On June 7, 1947, and June 14, 1947, respectively, Jay E. Darlington, a taxpayer of the City of Hammond, Indiana, commenced two actions in the Lake Superior Court, Rooms 1 & 5, to enjoin the City of Hammond from paying the judgments rendered in the above causes, as well as 96 other causes in the Lake Superior Court, Rooms 1, 2, & 5. $958,000.00 worth of judgments had been rendered against the City of Hammond, in said cases, for "misapplication and diversion of funds". The venue of the two taxpayer's actions was changed to the Porter Circuit Court, Porter County, Indiana, and the two actions were consolidated for trial. On September 7, 1948, the Porter Circuit Court entered its Special Findings of Fact and Conclusion of Law thereon, and rendered its decree thereon, finding all judgments in said causes void for fraud in their procurement.

As appears from the opinion of the Supreme Court of Indiana in Cause No. 30025, appearing in Appendix A to the petition herein, beginning at page 23 of the petition, at page 29, "the fraud consisted, generally, of the fact that the judgments were taken by the consent of the plaintiffs and defendant without any proof, although the named plaintiffs in the class actions were not bona fide holders of the bonds which they alleged to own or the bonds had been outlawed by the statute of limitations." The defendants in the taxpayer's case, (excluding the City of Hammond which joined the taxpayer as appellee in the ap-

peal) took an appeal to the Appellate Court of Indiana. See *Gilkison* v. *Darlington* (1952) 123 Ind. App. 28, 106 N.E. 2d 473. All of the original exhibits, introduced in the trial of the taxpayer's case, were made a part of the record on appeal by defendants-appellants (including the purported predecessors in interest of petitioners herein). See *Gilkison* v. *Darlington* (1952) 123 Ind. App. 28, 106 N.E. 2d 473; and *State, ex rel. Gilkison* v. *Clifford, Judge*, (1950) 120 Ind. App. 84, 89 N.E. 2d 630.

On June 23, 1954, the Porter Circuit Court, upon remand of the cause, restated its conclusions of law and entered its judgment in accordance with the mandate of the Appellate Court in the case of *Gilkison* v. *Darlington*, supra. On March 4 & 9, 1960, respectively, the City of Hammond filed motions in the respondent courts, Lake Superior Court, Rooms 1 & 5, to dismiss each of said actions (Cause Nos. 52261 and 57536) and have them stricken from the docket because of abandonment. Copies of the motions were served on the counsel of record for the plaintiff in each of said causes, Donald C. Gardner and Carl A. Huebner, respectively. In the Room 5 case (Cause No. 57536) Carl A. Huebner was also one of the four named plaintiffs (see Appendix A to petition herein, page 24).

On March 14, the respondent Lake Superior Court, Room 1, (Cause No. 52261) entered a judgment dismissing said action.

On June 27, 1960, Richard Zilky, petitioner herein, filed a petition to intervene in said cause as a party plaintiff, and on the same day filed a motion to vacate and set aside the order of dismissal entered by respondent court on March 14, 1960. (See petition, Appendix A, page 20.) On July 11, 1960, the defendant, City of Hammond, filed a motion in said cause to strike pleadings and papers of said

Richard Zilky. On July 28, 1960, the cause was submitted and evidence was heard (see petition, page 8) and on the following day respondent court entered an order denying Zilky's petition to intervene, and ordered his motion to vacate the dismissal stricken from the record. (See petition, Appendix A, page 20.)

In the Room 5 action here involved (57536) the cause was set for hearing on March 25, 1960, on which date Attorney Paul B. Huebner, appeared, but no further action was taken. (See petition, Appendix A, page 26.)

On April 18, 1960, pursuant to a change of venue from the judge, respondent Joseph V. Stodola, Jr. was appointed special judge. Thereafter, American Fletcher National Bank & Trust Company, Jane R. Barry and Charles R. Kinnaird filed "Petitions to Intervene" (See petition, page 9). Thereafter, the cause was submitted on the petitions to intervene and the City of Hammond's answers and objections thereto, evidence was heard (petitioners rested without offering any evidence) and on June 20 the respondent court entered an order denying the petitions to intervene. On said date, respondent gave petitioners 10 days for filing supplemental complaints with respect to any bonds on which said parties individually held as successors in interest. (See petition, Appendix A, page 26.)

Thereafter, petitioners, on June 23, 1960, filed a supplemental complaint in which they alleged that they were holders and owners of Barrett Bonds of the City of Hammond in which they purported to adopt in toto the complaint of said former owners (in the nature of a class action). (See petition, Appendix A, page 26.)

On June 27, 1960, the City of Hammond filed objections to and a motion to strike the supplemental complaint. (See petition, Appendix A, pages 9, 26, 27.) On July 7, the cause

was submitted on the City of Hammond's motion to strike the supplemental complaint and the City of Hammond's objections thereto. The supplemental complaint, which purported to "adopt the original complaint" was ordered stricken from the record. (See petition, Appendix A, page 27.) On July 27, respondent court entered findings among other things, that the motion to dismiss and strike the cause of action, because of abandonment, had been filed in the cause on March 9, 1960, notice had been served upon representatives of the class action, no response to the motion had been filed asserting any meritorious ground or reason why the cause should not be dismissed, and the court then, on the basis of the record before it, entered an order dismissing said cause for want of prosecution and the same was ordered stricken from the docket. (See petition, Appendix A, page 27)

On October 19, 1960, petitioners filed their respective original actions in mandate in the Supreme Court of Indiana seeking to command the respondents to set aside the orders complained of, as hereinabove set forth. (See Appendix A to petition, pages 19-31, incl.)

Respondents filed their returns to the alternative writs, issued by the Supreme Court of Indiana, on November 18, 1960. (See petition, page 10)

On May 23, 1960, the Supreme Court of Indiana, with an opinion in writing, in each of said mandate actions, dissolved the alternative writs and denied permanent writs. (See petition, Appendix A, pages 19-31, incl.)

On June 9, 1961, petitioners filed petitions for rehearing, and briefs in support thereof, in each of the mandate actions. On June 30, 1961, (Petition, page 11) the petitions for rehearing were denied by the Supreme Court of Indiana without opinion. (Petition, page 11).

III.

REASONS WHY THE CAUSES SHOULD NOT BE REVIEWED AND WHY THE WRITS SHOULD NOT ISSUE.

A.

No Federal Question, as Required by 28 U.S.C. §1257(3) Was or Is Involved.

At the outset, it is submitted by respondents that this court is without jurisdiction to review the causes involved herein because, contrary to the "jurisdictional statement" at page 2 of the petition, no federal question, as required under 28 U.S.C. §1257(3) was or is involved. The Indiana Supreme Court, under the applicable Indiana statutes, decisions, and Supreme Court rules, properly and correctly, in each of the two cases herein involved, denied the petition for the extraordinary writ of mandate.

The reasons for the denial, in each of the cases, clearly appear upon the face of the opinions of the Indiana Supreme Court and involve only state questions. (Petition, Appendix A, pages 19-31, incl.)

Therefore, no jurisdiction is conferred on this court under 28 U.S.C. §1257(3).

Even if there were a federal question which could have been raised below, to bring petitioners within the scope of 28 U.S.C. §1257(3), (which there was not) no such question was ever raised, or attempted to be raised, by petitioners either in the respondent courts or in the Indiana Supreme Court, in a manner which might or could confer jurisdiction on this Court.

The petitioner's contention, at page 15 of their brief, that the federal question sought to be reviewed was first raised in the petitions for rehearing filed by the petitioners in the mandate actions in the Supreme Court of Indiana, is erroneous.

While it is conceded by petitioners that no federal question was raised in respondent courts below, or in the Supreme Court of Indiana in the mandate actions, prior to the filing of their petitions for rehearing, an examination of the petitions for rehearing reveals that even in said petitions there was no attempt to "inject" a federal question. At page 11 of the petition, under the heading "Statement Of The Cases" reference is made not to the petitions for rehearing, but to the composite brief which petitioners filed in support of said petitions.

In Appendix C, petition, pages 38-41, petitioners set out portions of the record which they claim shows that the federal question was timely and properly raised. This contention is entirely without merit.

It is significant that the portion of the record quoted at page 38 of the petition is a quotation from the "concluding portion of the brief filed by the petitioners on June 9, 1961, in the Supreme Court of Indiana in support of their petitions for rehearing", and not from the Petitions for Rehearing.

Thus, it affirmatively appears on the face of the petition, and Appendix C thereto, that the statement at page 15 of the petition, that the federal question sought to be reviewed was first raised in the petitions for rehearing filed by petitioners in the mandate actions in the Supreme Court of Indiana is contrary to the record.

Rule 2-22 of the Supreme Court of Indiana, set forth at pages 35 & 36 of the petition, Appendix B, clearly states